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No. 684

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IN

The Supreme Court Of the United States

LANGHORNE CARTER RORER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN

The Supreme Court Of the United States

LANGHORNE CARTER RORER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

I

Prior Proceedings

This petition of Langhorne Carter Rorer for a writ of certiorari is from the conviction of Rorer in the United States District Court of the Eastern District of Virginia, Alexandria Division.

Rorer and Francis A. Simpson, Jr., were indicted by the Grand Jury, December 1963 term, for seven counts involving gambling, one of which was a conspiracy count; the other counts involved specific acts in the use of interstate facilities for wagering, particularly referring to the 1963 World Series.

On March 17, 1964, the District Judge, after trial, entered judgment of acquittal on three of the counts; the jury returned verdicts of guilty on the four remaining counts. On May 7, 1964, judgment of acquittal was entered on one other count, and a sentence of three years was imposed for the conspiracy count, and two years each on the remaining two counts, to run concurrently.

Thereafter an appeal was noted to the Circuit Court of Appeals for the Fourth Circuit, briefs filed, and argued. On October 12, 1964, the Fourth Circuit entered the following:

"PER CURIAM

> As the record discloses to us no error of substance in the trial, and evidence adequate to sustain the verdict, we affirm.
>
> Affirmed"

II

Langhorne Carter Rorer is presently on bond of $5,000.00.

III

The statutes involved are:

The Fourth Amendment to the United States Constitution.

United States Code: Title 18, Sections 2, 371, 1084, 1952 and 3109.

United States Code: Title 47, Sections 203(a) and (c).

IV

The substance of the offenses is that the defendants were in the business of betting and accepted bets on the 1963 World Series. These bets were made by telephone from Brooklyn, New York, to Fairfax County, Virginia. The bettor lost and reported the matter to the Federal Bureau of Investigation. Partial payment was alleged to have occurred by money order wire and by a trip to Washington, D. C., by the bettor.

V

Designation of record in lower courts.

Affidavit supporting search warrant.

Search warrant for 31 Arcturus Drive.

Indictment.

Motion to quash warrant.

Transcript pages 122, 123, 124, 171, 172, 176, 177.

VI

The question: The trial judge erred in overruling the motion to quash the search warrant, and in admitting the evidence obtained from the home of Rorer at 31 Arcturus Lane, Fairfax County, Virginia.

The United States Circuit Court for the Fourth Circuit erred in finding no error of substance.

Defendant's right to be secure in his home against unreasonable search and seizure, as that right is implemented by Section 3109 of Title 18, United States Code has been ignored.

VII

The question above grows out of the manner in which the search warrant was executed. The statute requires the official executing the search warrant to announce his identity, and when denied entry, permits him to break and enter. The transcript shows from the testimony of the Federal agents on pages indicted above, Item III:

a. That the weather on the day of execution of the warrant was wintery, that the door through which the FBI agents entered had a storm door, and that the windows of the house were closed.

b. That the agents knocked and rang, and waited 15 or 20 seconds, 30 seconds, or one minute, depending on the witness.

c. That the required announcement of identity and authority was insufficient to be heard by an agent seated in a truck 15 to 20 feet away, except that he heard it by radio. The transmission was from a miniature transmitter on the wrist of the agent seeking entry to a receiver in the truck.

The conclusion from the facts outlined above must be that the announcement required was not given in the manner contemplated by the statute, and even if given

properly, the time lapse was too short to give rise to the conclusion that the agents were refused entry.

The spirit and the letter of the statute were violated, and the statute Section 3109, is the ground rule of how the Constitutional right shall be preserved.

IX

The writ of certiorari should be granted;

a. This Court has not spoken directly on this point.

b. The recorded cases have refined the meaning of the statute so that, with some exceptions, the refusal to admit required by the statute is equated with the failure to respond to the door bell within seconds and with a promptness not usual in every day affairs.

c. The opinion of this Court on the point here raised would be invaluable to the bar, the lower courts and law enforcement officers.

LANGHORNE CARTER RORER

By.....
Counsel

DONOVAN, TURNBULL AND BROPHY
106 Little Falls Street
Falls Church, Virginia
Attorneys for Appellant

By.....

I certify that copies of the above have this ..... day of November 1964 been mailed to the Clerk of the Circuit Court of Appeals and counsel of record for the United States.

.....

PHILIP N. BROPHY

APPENDIX

1-A

Transcript pages 122, 123, 124.

CROSS EXAMINATION

BY MR. HEINZ:

Q. Mr. Pfaff, did you go in at the same time that the other Agent went in?

A. I don't know who the other Agent was.

Q. How many of you went to this house, how many Agents?

A. Approximately eight, sir.

Q. Approximately eight Agents?

A. Right, sir.

Q. Who lead the eight in?

A. I guess there were four of us that went in approximately the same time, four or five.

Q. Is that the first four, second four or the . . .

A. We would be the first four or first five that went in.

Q. Who had the search warrant with them?

A. I believe Agent Nichols at the time.

Q. Agent Nichols?

A. Right.

Q. Were you present when he went in?

A. I was, sir.

Q. Right with him?

A. Right behind him, sir.

Q. Did you open the door and walk in?

A. No, sir. The door had to be broken down.

Q. The door had to be broken down?

A. Forced open, yes, sir.

Q. How long were you all out there?

A. Not more than fifteen or twenty seconds I would say.

Q. Before you broke the door down?

A. You mean out . . .

Q. Knocking on the door.

A. It was over thirty seconds, close to . . .

Q. You waited thirty seconds before you broke the door down?

A. Yes, sir.

Q. Did anyone identify themselves?

A. Yes, sir.

Q. Where was the identification made, outside or inside?

A. At the time the identification was made and the words were said, "F.B.I . . . I have a search warrant and a warrant of arrest," I was in a truck parked inside with a radio contact with the two men who were at the door.

Q. Where was this truck located?

A. In the driveway approximately fifteen or twenty feet from the front door of the house.

Q. You don't know whether they said, "This is the F.B.I.," or not do you?

A. I heard it on the radio, yes, sir.

Q. You heard it on the radio?

A. Yes, sir.

Q. How sensitive is that radio?

A. Quite sensitive. It was a hand pack type radio, and he could talk right into it and I was on the other radio in the truck.

Q. But that doesn't necessarily follow because you heard it he said it lound enough for someone inside to hear it, does it?

A. I wouldn't know, sir. I was listening to the radio.

MR. HEINZ: Your Honor, in view of this testimony they waited only thirty seconds before they broke the door down, I certainly think this was an unlawful search and seizure.

THE COURT: Objection overruled.

Transcript pages 171, 172.

Q. You don't know how many were on the raid with you?

A. I don't know how many other Agents were on the raid. In the vehicle I was in I believe there were six.

Q. Six. Who was the chief of the raid?

A. Special Agent in Charge of the Richmond Office, Mr. Brown.

Q. Mr. Brown. How long when you arrived there what did you do, knock on the door?

A. Knocked on the door, rang the door bell.

Q. And then immediately broke it down?

A. No, we didn't.

Q. How long would you say you waited before you broke it down?

A. I would say at least one minute.

Q. What?

A. After ringing the door bell and announcing and also knocking on the door.

Q. What did you announce?

A. At ten second intervals, I believe three ten second intervals, and then through radio transmission we called the other Agents.

Q. Three ten seconds?

A. I say after that we called the other Agents still in the vehicle I arrived in.

Q. Is that when you broke the door down?

A. After the other Agents arrived from the vehicle.

Q. When you announced, what did you announce?

A. Announced that we were Special Agents of the Federal Bureau of Investigation, that we had arrest warrant and search warrant.

Q. For what purpose?

A. Beg pardon?

Q. Did you just say you had arrest warrant and search warrant? Is that all you said?

A. Arrest warrant and search warrant, yes.

Q. Now, what part of the house did you go to after you gained admission?

A. Down to the basement.

Transcript page 176, 177.

Q. Now, how loud did you say, "This is the F.B.I." when you were trying to gain entrance to the place.

A. Repeat that.

Q. How loud did you say, "This is the F.B.I."?

A. Do you want me to demonstrate?

Q. Yes. I think it would be in order.

A. "This is the F.B.I. We have a search warrant and arrest warrant."

Q. Now, the door was closed, the windows were closed. Was there a storm door on the door?

A. Yes, sir, there was.

Q. There was?

A. Yes.

Q. Storm windows on the windows?

A. Right, sir.

Q. And who did you first see when you went into this place?

A. Mr. Rorer down in the basement.

Q. You didn't see anybody upstairs?

A. No.

Q. Who else did you say was there besides Mr. Rorer?

A. You mean down in the basement?

Q. No. In the house.

A. Who else did I say?

Q. Yes.

A. I said Special Agent Crowder, and Special Agent Lardner of the F.B.I.

Q. I said besides Mr. Rorer in this home, who else was there?

A. Yes. Subsequently I saw a colored woman, negro woman.

Q. Where was she?

A. The first time I saw her?

Q. Yes.

A. The first time I saw her was in the recreation room downstairs.

Q. Where had she been? Do you know?

A. I didn't ask her. I didn't talk to her.

Q. Did one of the Agents bring her down?

A. I don't recall.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9496

United States of America,
Appellee,
versus
Langhorne Carter Rorer and Francis A. Simpson, Jr.,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
OREN R. LEWIS, DISTRICT JUDGE.

(Argued October 7, 1964. Decided October 12, 1964.)

Before BRYAN and BELL, Circuit Judges, and GORDON, District Judge.

James Heinz for Appellant Simpson, James P. Davenport for both Appellants, and John A. K. Donovan (Donovan, Turnbull and Brophy on brief) for Appellant Rorer, and Plato Cacheris, Assistant United States Attorney, (C. V. Spratley, Jr., United States Attorney, and Edward T. Joyce, Attorney, Department of Justice, on brief) for Appellee.

PER CURIAM:

As the record discloses to us no error of substance in the trial, and evidence adequate to sustain the verdict we affirm.

Affirmed.

Office-Supreme Court, U.S.
FILED
NOV 27 1964
JOHN F. DAVIS, CLERK

No. 724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

FRANCIS A. SIMPSON, JR., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

FRANCIS A. SIMPSON, JR., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

Francis A. Simpson, Jr., Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on October 12, 1964.

CITATION TO OPINION BELOW

There was no opinion by the United States District Court. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, pg. 2a, is reported in — F. 2d —.*

* The opinion has not yet been reported in the advance sheets of the Federal Reporter System.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 12, 1964 (R. Vol. V, pg. 23). On November 9, 1964 an application was made to the Honorable Earl Warren, Chief Justice of this Court for an extension of time within which to file a petition for writ of certiorari in this cause. On November 18, 1964 the Chief Justice executed an order extending the time within which to file a petition for writ of certiorari in this cause to and including November 27, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Under the peculiar circumstances of this case was petitioner fairly tried and convicted of conspiracy and unlawful use of interstate facility for transmission of bets and wagers, where there was a complete lack of any evidence with respect to the substantive offenses and insufficient evidence as to the alleged conspiracy to commit these offenses.

STATUTES INVOLVED

The statutory provisions involved are the Act of June 25, 1948, c. 645, 62 Stat. 701; U.S.C., Title 18, § 371, and the Act of September 13, 1961, Pub. L. 87-216, § 2, 75 Stat. 491; U.S.C., Title 18, § 1084(a). They are printed in Appendix A, infra, pg. 1a.

STATEMENT

On March 16, 1963, petitioner, Francis A. Simpson, Jr., and a co-defendant, Langhorne Carter Rorer,[1]

[1] Langhorne Carter Rorer's conviction was affirmed by the Fourth Circuit Court of Appeals at the same time as petitioner. On November 12, 1964 he filed a petition for writ of certiorari, No. 684.

were indicted in seven (7) counts by a Grand Jury of the United States District Court for the Eastern District of Virginia, Alexandria Division, charged with violations of U.S.C., Title 18, § 1084(a) and § 1952; conspiracy to violate these sections and a violation of U.S.C., Title 47, § 153 (R. Vol. 1, pp. 1-5). Following trial, petitioner and the co-defendant were convicted of conspiracy, and violation of § 1084(a) in two counts.[2] They were sentenced to imprisonment for three (3) years on the conspiracy count and two years on the two violations of § 1084(a), the sentences to run concurrently.

The evidence showed that Jerry Marcus of Brooklyn, New York was engaged in placing wagers on sporting events with Rudy Vozzola of Alexandria, Virginia, an admitted bookmaker (R. Vol. II, pp. 39-43, 76-77). At the time of the alleged commencement of the conspiracy, Vozzola was indebted to Marcus in the amount of $3,000. Marcus traveled to Washington, D. C., where Vozzola met him at the airport and took him to a restaurant in the District of Columbia where they met Langhorne C. Rorer, the co-defendant (R. Vol. II, pg. 43). At the meeting, which took place in August, 1963, Rorer gave Marcus his telephone number and told him that he could place bets with him (R. Vol. II, pp. 43-44). Thereafter, Marcus made several bets with Rorer by telephone from New York to Virginia (R. Vol. II, pg. 45).

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[2] At the conclusion of the Government's case-in-chief, the trial court entered judgment of acquittal on counts 2 and 3; the Government withdrew count 7 (violation of U.S.C., Title 47, § 153) After verdict, on motion, the Court struck count 4; thus leaving only convictions on counts 1, 5 and 6.

Vozzola, according to his testimony, telephoned Rorer at his home and laid off number bets with him (R. Vol. II, pp. 80-81).

In the fall of 1963, Marcus made a number of bets with Rorer by telephone from Brooklyn, New York to Alexandria, Virginia (R. Vol. II, pp. 49-50). Marcus testified that he talked to Rorer on the telephone at least twenty (20) times (R. Vol. II, pg. 63). As a result of these bets, Marcus owed Rorer $10,000. Rorer telephoned Marcus and attempted to collect this indebtedness (R. Vol. II, pg. 50).

Acting upon a search warrant for Rorer's home and automobile, agents of the Federal Bureau of Investigation seized certain gambling paraphernalia from his automobile.

For a period of an hour and a half following the arrest of Rorer, an agent of the Federal Bureau of Investigation monitored Rorer's telephone and received thirty-four (34) telephone calls. Only two of them could be said to be related to gambling (R. Vol. II, pp. 113-119).

On October 1, 1963, three months after the alleged conspiracy commenced, Marcus came to National Airport, Washington, D. C., to pay Rorer $1,250.00 (R. Vol. II, pg. 45). He was met at the airport by Rorer and Marcus entered the automobile, sitting in the front. Rorer was obviously driving (R. Vol. II, pp. 47-48). Marcus testified that petitioner herein, Simpson was in the back seat with another person; that " . . . and I think I gave it (the money) to Mr. Simpson and he counted it." They proceeded to a place in Washington,

D. C. (R. Vol. II, pg. 47). At this meeting Marcus made bets (R. Vol. II, pg. 48).[3]

Marcus, aside from this ride in the automobile, never saw or spoke to Simpson, either by telephone or in person, and never had any dealings with him of any description whatsoever.

Although Vozzola admitted laying off bets with Rorer, he testified that he had called Rorer's home and had on occasion spoken with Simpson. He made no bets with Simpson. Nor did he lay off any bets with or through Simpson (R. Vol. II, pp. 81-82). Vozzola did state that he considered Simpson a good handicapper on games and that, "he (Simpson) bets good." At what point of time Simpson was a good game handicapper or bet, the record does not disclose, although neither of these activities constitutes any criminal activity.

Of the two telephone calls which the agent monitored following the arrest of Rorer in his home, which might be described as being gambling calls, neither call involved Simpson, in any fashion.

Another witness, Gary Taylor, said that he had a conversation with Rorer in the fall of 1963 wherein Rorer indicated that he might take some football plays and inquired whether Taylor was going to do any betting (R. Vol. II, pg. 152).

---

[3] Whether all the persons in the automobile were at this meeting is unknown. Marcus was asked by the prosecutor whether he made bets at this meeting with Rorer and Simpson. He answered that he did. But we don't know whom he made the bets with. Inferentially it had to be with Rorer whom he had been betting with before and thereafter. The evidence against Simpson on this point is contained in the question of the prosecutor, not the answer of the witness.

Simpson was arrested in his home on an arrest warrant by agents of the Federal Bureau of Investigation. At the time of his arrest, a search revealed nothing, except that the agent took some ashes from his fireplace. These were later identified as football pool cards, but unrelated to any activities of Marcus (R. Vol. II, pp. 191-192).

At trial, Simpson and Rorer were represented by the same counsel. On appeal, Simpson was represented by his trial counsel. The record discloses, that the motions for judgment of acquital were made jointly as to both defendants with no discussion of the evidence or lack of evidence as to each defendant. The record also discloses, that the argument to the jury by defense counsel failed to discuss any of the evidence or lack of it pertaining to Simpson, except general remarks as to the credibility of certain witnesses that could be considered as being applicable to both defendants (R. Vol. III, pp. 33-49).

It can only be assumed that the reason the trial Court did not grant motions for judgment of acquittal on the remaining counts as to Simpson was that defense counsel did not discuss the lack of evidence with respect to each defendant. The reason for affirmance by the Fourth Circuit Court of Appeals can only be speculated from a careful consideration of Simpson's brief and appendix, particularly, the statement of facts contained in his brief.

REASONS FOR GRANTING THE WRIT

1. While it is not the usual function of this Court to review the sufficiency of the evidence in a criminal case, the peculiar circumstances of this case, coupled with the complete lack of any evidence showing peti-

tioner's violation of U.S.C., Title 18 § 1084(a), and the patent insufficiency of the evidence with respect to Simpson's participation in the alleged conspiracy. this Court in its supervisory capacity as administrator of criminal justice in Federal Courts ought not to permit this conviction to stand.

Counts 5 and 6 of the indictment charged Simpson and the co-defendant with violating § 1084(a). Two elements of the crime are involved. First, Simpson had to knowingly use a wire communication facility for transmission (that is sending, *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.* (USDC N.D. Ill. E.D.—3 Judge Constitutional Court), 220 F. Supp. 621 at 638 (1963)) in interstate commerce of bets, wagers or information.

Simpson never talked to Marcus on the telephone or did he ever send or receive any wire message from him. In fact other than the ride in the automobile in Washington, D. C., four days before the alleged violations of Counts 5 and 6, Simpson never had anything to do with Marcus at all. Nor is there the slightest evidence of any description whatsoever that Simpson aided and abetted Rorer in any fashion whatsoever with respect to these substantive offenses.

In fact, the other element of the crime, to wit, that Simpson was engaged in the business of betting or wagering was never established. The fact that Vozzola said Simpson was a good handicapper on games and that, "he (Simpson) bet good," may make him a good bettor and a good game handicapper, but it doesn't mean that he is engaged in the business of betting or wagering. Does the Government really believe that because Simpson answered the telephone at Rorer's home when Vozzola telephoned, on occasion, (and

where no bets or lay offs were made with Simpson) that he was engaged in the business of betting or wagering on October 4 and 5, 1963 as charged in the indictment (R. Vol. I, pp. 4-5). *Kelly* v. *Illinois Bell Telephone Co.*, 7th Cir., 325 F. 2d 148 at 152.

The Government, in all candor, should admit not only that the evidence was insufficient, but there was NO EVIDENCE at all showing Simpson guilty of counts 5 and 6 of the indictment.

2. With respect to the conspiracy, the only evidence is that Simpson, three months after the alleged formation of the conspiracy with Rorer, and after Marcus had been betting with Rorer, rode in the rear seat of an automobile from National Airport, Washington, D. C. to a place in Washington, D. C. and Marcus, who was sitting in the front — Rorer was driving — thinks he gave the money he owned Rorer to Simpson and he counted it. This is the basis for allegedly establishing that Simpson entered a conspiracy with Rorer to violate U.S.C., Title 18, § 1084 and 1952.

Marcus made all of his bets with Rorer. At his first meeting with Rorer and Vozzola it was agreed that all pay-offs would be made personally. A month and a half later Simpson meets Marcus for the first time, in an automobile with Rorer and another person (R. Vol. II, p. 66). Thereafter Marcus continues to bet only with Rorer. As a result he owes Rorer, not Simpson, $10,000. When Marcus doesn't pay up, Rorer, not Simpson, telephones him and demands payment. The telephone number that Marcus uses is Rorer's phone located in his house, not Simpson's. The instructions to come to Washington, D. C. to make the pay-off are given by Rorer, not Simpson, who isn't even present. The evidence does not disclose any

knowing participation by Simpson in this alleged conspiracy. *Ingram* v. *United States,* 360 U.S. 672, 79 S.C. 1314, 3 L. ed. 2d 1503. Even in that case, Smith and Law had intimate connection with the gambling operation as employees, but the evidence failed to disclose the necessary element of knowledge of the conspiracy.

3. The evaluation of the representation afforded to petitioner, Simpson, is more properly a function of the judiciary, than it is of individual members of the bar. Great advancements have been made in providing indigents in Federal Courts with excellent representation, so that they may compete in criminal cases on the same level with wealthy defendants. But left to starve, so to speak, are that great mass of individuals who are neither wealthy nor indigent. They retain counsel quite often, simply on the basis that counsel is a member of the bar and open for business. It is unjust to hold them responsible for the conduct of their litigation, simply because they had sufficient monies to retain counsel. The responsibility must rest with the bar, and the judiciary.

In determining whether or not this case is sufficiently unusual as to require the Court's examination of the sufficiency of the evidence, we ask the Court to examine Appellant, Simpson's brief and appendix filed in the Fourth Circuit Court of Appeals, which is part of the record in this cause, with particular attention to the Statement of Facts contained therein. Examine also the motions for judgment of acquittal, during the trial, where the sufficiency of the evidence with respect to each defendant was not discussed, but rather the motion was made jointly and reliance was had on other matters. Examine, if you will, the argument to the

jury by counsel for both defendants, and determine what the jury was told with respect to the slight evidence that was introduced against Simpson.

We believe that the situation in this case is peculiarly unusual to the degree that this Court ought to grant petitioner's petition for writ of certiorari, or in the alternative, summarily grant said petition and vacate the judgment of the Court of Appeals with directions that the cause be re-briefed and re-argued.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

EDWARD L. CAREY
WALTER E. GILLCRIST
Counsel for Petitioner
821 Fifteenth Street, N.W.
Washington, D. C. 20005

November 27, 1964

APPENDIX A

Statutes

The Act of June 25, 1948, c. 645, 62 Stat. 701; United States Code, Title 18 § 371.

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The Act of September 13, 1961, Pub. L. 87-216, § 2, 75 Stat. 491; United States Code, Title 18 § 1084 (a).

§ 1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9496

UNITED STATES OF AMERICA, *Appellee*,

v.

LANGHORNE CARTER RORER AND FRANCIS A. SIMPSON, JR., *Appellants*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
OREN R. LEWIS, DISTRICT JUDGE.

(Argued October 7, 1964. Decided October 12, 1964.)

Before BRYAN and BELL, Circuit Judges, and GORDON, District Judge.

James Heinz for Appellant Simpson, James P. Davenport for both Appellants, and John A. K. Donovan (Donovan, Turnbull and Brophy on brief) for Appellant Rorer, and Plato Cacheris, Assistant United States Attorney, (C. V. Spratley, Jr., United States Attorney, and Edward T. Joyce, Attorney, Department of Justice, on brief) for Appellee.

PER CURIAM:

As the record discloses to us no error of substance in the trial, and evidence adequate to sustain the verdict, we affirm.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 684

LANGHORNE CARTER RORER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 724

FRANCIS A. SIMPSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. V, 20)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1964. Petitioner Rorer filed a petition for

[1] The record is in five volumes. Volumes II, III and IV are the transcript of the trial.

760-581—65

a writ of certiorari on November 12, 1964.[2] The Chief Justice extended the time for petitioner Simpson to file a petition for a writ of certiorari to and including November 27, 1964, and it was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether execution of the search warrant at petitioner Rorer's home violated his constitutional or statutory rights.

2. Whether the evidence was sufficient to sustain petitioner Simpson's conviction.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted on the first, fifth and sixth counts of a seven-count indictment (R. III, 77–78; R. IV, 16–17) charging conspiracy and substantive offenses involving the use of interstate transportation and wire communications facilities to conduct an illegal betting and wagering business in violation of 18 U.S.C. 1084 and 1952 (R. I, 1–5). Petitioners were sentenced to three years imprisonment (R. IV, 21–22).[3] The court of appeals affirmed per curiam (R. V, 20–21).

The pertinent evidence may be summarized as follows:

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[2] Copies of the petition were served under Rule 33(2) of the Rules of this Court on December 17, 1964.

[3] Simpson was sentenced to serve three years on the conspiracy count. Two-year sentences to be served concurrently with each other and with the sentence on the first count were imposed for each of the substantive offenses (R. IV, 21–22).

In 1962 and 1963 Jerry Marcus placed bets with one Vozzola, first in Washington and then by telephone from New York (R. II, 40). As a result Vozzola owed Marcus several thousand dollars (R. II, 77, 94–95) which he was unable to pay (R. II, 40–41, 77–78). Marcus pressed Vozzola for payment (R. II, 57–59, 89–90, 93–94), and Vozzola sought a loan from petitioner Rorer to pay Marcus and to "take him off my back" (R. II, 78). In August 1963, Marcus came to Washington and was introduced by Vozzola to Rorer (R. II, 43). Thereafter, Marcus placed bets with Rorer by telephone from New York to Rorer's home in Alexandria (R. II, 44–46, 64).

On October 1, 1963, Marcus flew to Washington and was met by petitioners Rorer and Simpson (R. II, 47). Marcus gave Simpson $1250 which Simpson counted and retained (R. II, 47–48).[4] Marcus then placed wagers with Rorer and Simpson on the world series and on various football games (R. II, 47–48).

Marcus returned to New York and placed wagers with Rorer by telephone on October 5 and 6, 1963 (R. II, 49–50). As a result of these wagers, Marcus became indebted to Rorer for about $10,000 but refused to pay (R. II, 50, 62). Vozzola discussed with both petitioners the fact that Marcus had said he had "turned them in" to the F.B.I. (R. II, 83–84).

During the period after Vozzola turned Marcus over to petitioner Rorer, Vozzola would "lay off" some num-

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[4] Marcus had once paid Rorer by a money order made out to Vozzola. Rorer objected to this method and insisted that payment be in person (R. II, 46–47).

bers with Rorer. Sometimes Simpson answered the telephone and Vozzola would ask his advice about a game because Simpson was a good handicapper (R. II, 81–82). On at least one occasion when petitioner Simpson answered the telephone, Vozzola asked him how they were getting along with Jerry Marcus (R. II, 87–88).

On November 1, 1963, F.B.I. agents obtained arrest warrants for both petitioners and search warrants for petitioner Rorer's home and car. Petitioner Rorer was found in the basement and placed under arrest (R. II, 170–173). The agents seized an adding machine, a copy of the Washington Post open to the horse racing charts and some "flash" paper, which burns rapidly and leaves no ashes (R. II, 154–157). Rorer's car was searched, and "flash" paper was found (R. II, 168–169). One Special Agent answered Rorer's telephone from 3:45 p.m. to 5:20 p.m. and received thirty-four calls—an average of more than one call every three minutes (R. II, 112–119). Numerous phrases relating to wagering appeared in the notes of the calls, including "What the post time for the 7th at Laurel"; "What was the first?"; "Did you get the middle yet?"; "Tell him the Blue Boy did not show this morning." At various times, the callers asked for Jiggs or Junio, the names by which Simpson was known (R. II, 76, 113–119, 129–130).

Petitioner Simpson was arrested in the basement of his home (R. II, 103–104). As the arresting officer reached the foot of the stairs to the basement, he observed a flash of light coming from the fireplace in front of which Simpson was standing. He removed some

ashes and debris later identified as football pool or parlay cards normally used in bookmaking operations (R. II, 104–106, 191–192).

ARGUMENT

1. Petitioner Rorer asserts that evidence obtained from his home should have been excluded on the ground that the entry of the F.B.I. agents into the house was unlawful under 18 U.S.C. 3109 (Pet. No. 684, at 4–5).[5] Three times, at ten-second intervals, while knocking on petitioner's door and ringing the door bell, the agents identified themselves as representatives of the F.B.I. and stated that they had search and arrest warrants (R. II, 171–172). Other agents then arrived, and the door was broken down (R. II, 122, 172). The interval of time from beginning to end was "at least one minute" (R. II, 171).

The only issue presented is whether the lapse of time constituted a "refused admittance" under the statute. This elapse of at least one minute[6] was sufficient

[5] Section 3109 provides that "[t]he officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

[6] Petitioner's allegation of inconsistent testimony by F.B.I. agents (Pet. No. 684, at 4) is unfounded. Agent Cohrs, who was at the door from the beginning, stated that the time interval was at least a minute (R. II, 171). Agent Pfaff, who was called from the truck after the door bell had been rung three times at ten-second intervals, stated that he was at the door fifteen or twenty seconds before forcible entry (R. II, 123). Agent Crowder, who was summoned from the truck, testified it was two or three minutes before he was called to the door (R. II, 161).

under the circumstances. The search warrant stated that petitioner possessed "flash" paper which could be rapidly destroyed, so that a substantial delay might have resulted in successful destruction of the contraband, particularly since petitioners knew they had been reported to the F.B.I. (R. II, 83–84). Under the circumstances, the statutory condition for forcible entry (and any possible constitutional protection) was satisfied. *McClure* v. *United States*, 332 F. 2d 19 (C.A. 9), petition for certiorari pending, No. 258 Misc., this Term; *Masiello* v. *United States*, 317 F. 2d 121 (C.A. D.C.). Since announcement was made, this case presents no issue regarding the nature of the exigent circumstances which would excuse a failure to announce—a question which was specifically reserved in *Miller* v. *United States*, 357 U.S. 301, 309.

2. Petitioner Simpson asserts that there is insufficient evidence to support his conviction on the conspiracy count or the substantive counts (Pet. No. 724, at 6–7). However, the evidence fully justified the jury in concluding that Simpson was an informed and interested participant in the interstate gambling transactions between Rorer and Marcus. On October 1, 1963, he accompanied Rorer to meet Marcus and was given $1,250 by Marcus. At that same meeting Marcus placed additional bets. Vozzola indicated that he often called Rorer's residence and talked to Simpson about gambling information. On at least one occasion he inquired of Simpson how they were getting along with Marcus. Simpson was present at a conference with Vozzola and Rorer to discuss the implications of Marcus' report of their activities to the F.B.I. Just prior to his arrest,

Simpson burned football parlay cards in his fireplace. On this evidence, his participation with Rorer in operations with an interstate scope was clearly established, as was his knowledge of Marcus' wagering activities. Since the sentence on the conspiracy count is longer than those on the substantive counts which run concurrently with it, the proof of conspiracy is adequate to support the judgment. *Lawn* v. *United States*, 355 U.S. 339, 359; *United States* v. *Johnson*, 319 U.S. 503, 518.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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